Supreme Court, U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 394.

THE UNITED STATES, PETITIONER,
v.
BYRON BROWN RALSTON.

Brief in Opposition to Petition for Writ of Certiorari.

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FRED W. SHIELDS,
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THE UNITED STATES, *Petitioner*,
v.
BYRON BROWN RALSTON.
No. 394.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Court of Claims (R. 3–6) is not yet officially reported.

Jurisdiction.

The judgment of the Court of Claims was entered June 3, 1940. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

Question Presented.

Whether a private act of Congress providing for the retirement of a commissioned officer of the Navy, with the retired pay *and allowance* of the grade in which the President was authorized to appoint him, authorizes the payment of rental and subsistence allowances to him.

Statute Involved.

The private act of Congress of May 14, 1928, c. 554, 45 Stat. 1830, reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

That the President is authorized to appoint Byron Brown Ralston, formerly lieutenant commander in the United States Navy, a lieutenant commander in the United States Navy and place him upon the retired list of the Navy with the retired pay and allowance of that grade with credit for any purposes for all service to which he was entitled on April 15, 1927: *Provided*, that a duly constituted naval retiring board finds that the said Byron Brown Ralston incurred physical disability incident to the service while on the active list of the Navy: *Provided further*, That no back pay, allowance, or emoluments shall become due as a result of the passage of this act.

Statement.

The findings of fact of the Court below may be summarized as follows:

The respondent was graduated from the Naval Academy in 1914, and served on active duty in the Navy until April 15, 1927 (Fdg. 1). On April 5, 1917, he underwent an operation for double hernia, in a Naval Hospital, and returned to active duty three weeks later, since the operating surgeon advised him that his "condition" would not recur (Fdg. 2). The respondent was an engineer officer, and his duties involved work of a strenuous nature (Fdg. 2). On several occasions, while so working, he complained to the medical authorities, but continued his work without further medical care (Fdg. 2). Respondent was unsuccessful in his efforts to obtain a change of duty which would relieve him of engineering work. He submitted to a physical examination, and was pronounced fit, whereupon he determined to change his occupation. On January 31, 1927, he accordingly submitted his resignation from the service (Fdg. 3). On February 25, 1927, he reported to the Bremerton Navy Yard, State of Washington, for a physical examination before he was released from the service. It was then found that he had a recurrent hernia. At the time he submitted his resignation he did not know that he suffered from the recurring double hernia (Fdg. 3). The acceptance of his resignation was withheld after the physical examination and he was permitted to proceed to the Brooklyn Naval Hospital, where his condition was confirmed, but an operation was

discouraged (Fdg. 3). On March 30, 1927, a board of medical survey found the hernia to exist, but recommended that respondent be returned to active duty (Fdg. 3). On April 15, 1927, respondent's resignation was accepted, at which time he protested to the Navy Department that he should have been ordered before a retiring board because of the recently discovered physical disability (Fdg. 3).

On May 14, 1928, the private act was approved authorizing the President to appoint the respondent a lieutenant commander in the Navy, and place him on the retired list of the Navy with the retired pay and allowance of that grade, provided a duly constituted naval retiring board found that he had incurred physical disability incident to the service while on the active list of the Navy (Fdg. 4). Respondent appeared before a naval retiring board which found him to be so disabled (Fdg. 4). On July 16, 1928, the Secretary of the Navy wrote to respondent, his letter reading in part as follows:

> "You are advised that you have been, by direction of the President, placed on the Retired List of the Navy, as a Lieutenant Commander, from the 14th day of May, 1928, with retired pay and allowances of that grade, in accordance with the provisions of the Act of 14 May, 1928" (Fdg. 5.)

Since May 14, 1928, respondent has been on the rolls of the retired list of the Navy and has received three-quarters of his active duty pay, but has not received rental or subsistence allowance, although his wife and one minor daughter have been living with and dependent upon the respondent since his retirement (Fdg. 6).

After retirement respondent discussed the matter of allowances with his paymasters, and was told by them that it would do no good to present his claim for allowances, and he filed none until August 31, 1937, when he brought this suit in the Court of Claims, seeking to recover such allowances (Fdg. 7). The Court of Claims decided that respondent was entitled to recover such allowances, and entered judgment for the respondent in the sum of $15,414.89.

Summary of Reasons for Denying the Writ.

The writ of certiorari should be denied because:

1. The case does not involve questions of sufficient public importance to justify its consideration by this Court.
2. The decision of the Court of Claims is correct and sound.

ARGUMENT.

1. *The case does not involve questions of sufficient public importance to justify its consideration by this Court.*

This case is founded upon the provisions of a private act. Therefore it merely involves the interpretation of a single private act of Congress, affecting an individual officer of the Navy.

The petitioner seeks to emphasize the public importance of the issue involved by referring in a footnote on page 10 of its brief, to certain other private acts of Congress providing for the retirement of individual naval officers. Some of the acts referred to do contain language somewhat similar to that here involved. However, the language of others referred to is not similar and obviously does not give rise to a claim for allowances by the officers affected.[1]

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[1]The Act of June 17, 1926, c. 619, 44 Stat. 1608; the Act of May 22, 1928, c. 694, 45 Stat. 1858; and the Act of May 28, 1928, c. 844, 45 Stat. 1999, clearly indicate that the officers named therein were to receive no more in the way of retired pay or allowances than was received by officers retired under the general retirement laws.

The officers affected by the Act of March 4, 1923, c. 269, 42 Stat. 1500; the Act of June 17, 1926, c. 619, 44 Stat. 1608; the Act of April 17, 1926, c. 161, 44 Stat. 1459; the Act of May 22, 1928, c. 694, 45 Stat. 1858; and the Act of February 28, 1929, c. 396, 45 Stat. 2335 are no longer listed in the official Navy Directory of June 1, 1940. This indicates that they are no longer living. Any claim which they may have under those acts, terminated upon the death of the officer.

The officer affected by the Act of December 21, 1929, c. 14, 46 Stat. 1633, is detailed to active duty, and while so serving receives active duty pay and allowances independently of the private act.

The petitioner also refers in the same footnote to the sixteen Army officers who were retired under the provisions of the Act of July 9, 1918, c. 143, 40 Stat. 845, 889, and were subsequently reappointed and again retired under the provisions of the Act of March 3, 1927, c. 303, 44 Stat. 1350. None of these officers has filed suit for such allowances. All of them were required to serve at least 12 years on active duty before being eligible for retirement under the provisions of the Act of July 9, 1918, *supra*. They were all medical officers and all were retired for physical disability. Probably most, if not all, of these officers are now deceased and can not file claim for allowances.

The petitioner also asserts that "many potential claims" "for large sums" may be expected under the Act of May 13, 1908, c. 166, 35 Stat. 127, 128, and the Act of June 4, 1920, c. 227, 41 Stat. 759, 762, as a result of the decision of the Court of Claims in this case. Those acts provide for the retirement of certain officers of the Army and Navy, with the "rank, pay and allowances authorized by law" for their grade. Inasmuch as the phrase "authorized by law" can have reference only to the rank, pay and allowances authorized for such officers on the retired list under the general retirement laws of the Army and of the Navy, and such laws do not provide for the payment of allowances to retired officers unless recalled to active duty, it is clear that such officers are in no way affected by the decision in this case.

The petitioner says that, as a result of the decision below, the potential claims that may be brought by some thirty-one (31) retired officers, will amount to between $500,000 and $900,000. This statement is very vague and indefinite. There are not thirty-one officers retired under private acts similar to that here involved. The petitioner (footnote, page 10) lists but fifteen such private acts affecting as many officers. Of these fifteen officers but five have filed suits in the Court of Claims. Of the remaining ten officers but five are still listed in the 1940 Navy Directory, and the others presumably are no longer living. Richard E. Byrd, one of the five listed in the Navy Directory, is on active duty and entitled to allowances independently of the private act. The language of at least one of the remaining four private acts is not similar to

the act here involved, and it is not believed that the officer is entitled to allowances on the retired list under that act.

It is difficult to understand how the petitioner arrives at its estimate of from $500,000 to $900,000 as the cost of paying the potential claims which it asserts may arise under this decision. As has been pointed out, there are but eight, or at the most ten, potential claims instead of the thirty-one estimated by the petitioner. The amount involved in such potential claims is extremely uncertain, and depends upon the length of life of such officers, and whether they have dependents. These officers were all placed upon the retired list by reason of physical disability. The petitioner can only guess at the length of life of such officers. Its estimate of the potential cost is a mere surmise or conjecture. In any event, it is much less than is shown by its "estimates."

2. *The Decision of the Court Below is Correct and Sound.*

The decision of the Court below was made upon the authority of its earlier decision in *Sweeney* v. *United States*, 82 C. Cls. 640. That case likewise involved the retirement of a naval officer under a private act of Congress, which was practically identical to the act here involved. The respondent's claim is founded upon a private act of Congress. It depends solely upon the terms of that act. It is not affected by the general laws providing for pay of retired naval officers.

It is an elementary rule of statutory construction that the meaning of an act must be found in the language in which it is expressed, when free from ambiguity. *United States* v. *Hill*, 248 U. S. 420; *American Express Company* v. *United States*, 212 U. S. 522. The language of the private act is clear and explicit. The Court must take the act as it is written, without addition or diminution. *Gantz* v. *United States*, 70 C. Cls. 589. Effect is to be given to every word and clause, if possible, avoiding any construction which implies that Congress was ignorant of the meaning of the language it employed, or that it used meaningless or superfluous words. *Montclair* v. *Ramsdell*, 107 U. S. 147; *United States* v. *Fisher*, 109 U. S. 143, 145.

Petitioner contends that nothing in the private act of May 14, 1928, warrants the payment of allowances to the respondent, and that the literal words of the act, the legislative history, and the established administrative practice are all persuasive to the contrary. Each of petitioner's contentions will be discussed separately.

(a) *The Literal Words of the Act.*

Petitioner asserts that in the phrase "with retired pay and allowance" in the act the word "retired" modifies "allowance" as well as "pay," and the term "retired allowance" refers to such an allowance as retired officers receive under general law and that neither a subsistence nor a rental allowance was granted to respondent.

Since the enactment of the act of June 10, 1922, c. 212, 42 Stat. 625, officers have been entitled to but two allowances, namely, rental and subsistence allowances. There are no other allowances. Under the general law a retired officer receives retired pay but no allowances. There are no retired allowances under the general law. Therefore to adopt the petitioner's reasoning the Court must hold that "allowance" as used by Congress in the act of May 14, 1928, was meaningless and superfluous. Such a construction is manifestly improper. It is not the province of this Court to give a construction to an act which implies that Congress was ignorant of the meaning of the language it employed or that it used meaningless or superfluous words. *Montclair* v. *Ramsdell, supra.*

The petitioner then proceeds to argue that by the use of the words "and allowance," Congress undoubtedly had reference only to free hospitalization and medical care, which petitioner says had been described as "allowances" in the World War Emergency Officers' Retirement Act of May 24, 1928, c. 735, 45 Stat. 735. The term "allowances" in the military and naval services has a well-established and clearly understood meaning, and means rental and subsistence allowances. For instance, the enlisted men of the Army and Navy after retirement receive allowances in lieu of subsistence and quarters—in addition to the right of hospitalization and medical privi-

leges. See Act of March 2, 1907, c. 2515, 34 Stat. 1217; 5 Comp. Gen. 243; 5 Comp. Gen. 866. The material provisions of the World War Emergency Officers' Retirement Act of May 24, 1928, *supra*, are quoted in a footnote on page 7 of petitioner's brief. In that statute Congress did not describe hospitalization and medical care as "allowances," as contended by petitioner. Such items were called "privileges" in that act.

(b) *The Legislative History of the Act.*

Petitioner contends that the legislative history shows that it was not the intention of Congress that the respondent be paid "allowances" while on the retired list. Respondent knows of no such legislative history. The act was enacted without any debate or explanation other than that made by the Committee reports. These reports throw no light whatever upon Congress' intention with respect to the payment of "allowance" to the respondent.

In any event, this statute is clear. This Court has repeatedly held that no resort can be had to legislative history to disclose an intent other than that shown by the language of the statute. *United States* v. *Missouri Pacific R. R. Co.*, 278 U. S. 269, 278; *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, 449. The legislative history of an act is only admissible to solve doubt and not to create it. *R. R. Commission of Wisconsin* v. *Chicago, etc., R. R. Co.*, 257 U. S. 563, 589.

(c) *Administrative Practice.*

The petitioner urges that settled administrative practice also militates against the result reached by the Court below. It asserts that private acts employing substantially similar language have been in use for many years, yet rental and subsistence allowances have uniformly been denied to officers retired under such acts.

The Government made the same contention in this case in the Court below. It also requested the Court below to make a finding of fact that "it has long been the practice of the Navy Department when officers are retired under Special Acts to pay * * * no allowances."

The Court below declined to make such a finding as there was no adequate proof that the Navy Department ever adopted any administrative practice with respect to the payment of officers retired under special acts of Congress.[2]

The petitioner refers in its footnote on page 9 of its brief to a "few" of the private acts retiring officers with "the pay and emoluments" or "pay and allowances" of the grade.

The Act of January 28, 1881, c. 30, 21 Stat. 321, provided for the retirement of Major General Ord, "with the pay and emoluments of a major general of the United States Army on the Retired List." Thus under the literal provisions of the act, General Ord was entitled only to what a retired major general of the United States Army received. As other retired major generals received only retired pay without allowances that is what General Ord received.

The Act of September 28, 1890, c. 1043, 26 Stat. 500, provided for the retirement of Tenedor Ten Eyck, an Army officer, with "the pay and allowances pertaining to an officer of his rank on the retired list." Thus, he too was to receive no more than other officers of the same rank who were retired under the general retirement laws—that is, retired pay without allowances.

The Act of February 16, 1897, c. 235, 29 Stat. 803, provided for the retirement of John N. Quackenbush, a naval officer. The only reference to pay in the act is found in the proviso which reads: "That he shall receive no pay or emoluments except from the date of such reappointment."

The Act of June 17, 1926, c. 619, 44 Stat. 1608, provided for the retirement of Milton F. Nicholson, with the rank and "the pay and allowances of a lieutenant, junior grade, on the retired list of the Navy." The act does not provide for the

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[2] There was no evidence that there was any ruling or decision of the officials of the Navy Department covering such payments. The vouchers introduced in evidence by petitioner and referred to in footnote, page 9 of its brief, did no more than show the amount received by certain officers as retired pay. There was no explanation made as to the method used in computing such pay, nor the items included in it.

retired pay and allowances of a lieutenant, junior grade, but instead provides for the pay and allowances of a lieutenant, junior grade, *on the retired list.* As a retired officer does not receive allowances under the general laws, this act did not grant the officer any more than is received by other officers of his rank.

The Act of May 22, 1928, c. 694, 45 Stat. 1858, provided for the retirement of Charles R. Sies as a lieutenant in the Navy "with the rank and retired pay and allowances of a lieutenant *on the retired list of the Navy.*" (Italics supplied.) His right to allowances is no greater than that of Lieutenant Nicholson, retired under the similar act of June 17, 1926, *supra.*

None of these acts gave an absolute right to allowances while on the retired list as was given to respondent. The fact that they have not been paid allowances while on the retired list does not establish any administrative practice affecting the respondent here, because each officer was retired under an act materially differing in phraseology from the act here involved, and it does not appear that any of these officers ever claimed allowances, nor that the Department concerned ever took any action upon such a claim. No administrative practice can be established until it is first shown that the Department concerned has acted.

Conclusion.

For the reasons above set forth the petition for a writ of certiorari should be denied.

Respectfully submitted,

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